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SOME NEW AND NOT-SO-NEW APPROACHES TO IMMIGRATION COMPLIANCE IN THE WORKPLACE

STATES PASS IMMIGRATION LAWS AND MANDATE USE OF E-VERIFY

Arizona's immigration law has been in the news for quite some time. Just two weeks ago, the U.S. Supreme Court upheld the part of the Arizona law which requires employers to use E-Verify. Other states have followed Arizona's lead and introduced immigration compliance bills (Louisiana included). Others states, such as Alabama, Georgia, and Tennessee are taking immigration compliance to another level. All of these state laws will require employers within the state to use E-Verify, which is a free, Internet-based system operated by the U.S. Department of Homeland Security ("DHS") in partnership with the Social Security Administration ("SSA"). The system allows participating employers to electronically verify their employees' employment authorization—whether the employees are both authorized to work in the United States and authorized to work for the employer running the check.

E-Verify may only be used to check the work authorization after an individual accepts an offer of employment and after the employee and employer complete the Form I-9. In other words, employers cannot use E-Verify to pre-screen applicants. It may also not be used to check the authorization of current employees. Because E-Verify is only as good as the information obtained on the I-9 Form, it is important that the I-9 form be completed correctly and timely. If employers have not audited their I-9 processes before, they should do so now. (For more information on E-Verify, generally, please see our May 2008 E*Zine.)

Alabama

On June 9, 2011, Governor Robert Bentley signed a bill that:

- Prohibits employers from knowingly employing unauthorized aliens;
- Requires that any company with a contract or subcontract with the State or any political subdivision be enrolled and participating in E-Verify by January 1, 2012;
- Requires ALL employers to enroll and utilize E-Verify by April 1, 2012; and
- Requires the Alabama Department of Homeland Security to set up, by September 2011, an E-Verify program for businesses with 25 or fewer employees to use to verify the authorization of their employees.

The law does not provide a direct penalty for failing to register for E-Verify, but: (1) an employer that uses E-Verify will be immune from any liability under the act for knowingly employing an authorized alien; and (2) an employer with a contract or subcontract with the State (or political subdivision) that does not use E-Verify may lose the contract or have its business license(s) suspended or revoked.

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Some other important provisions of the law that affect employment are:

- Employers may not deduct as a business expense any compensation paid or in kind services provided to unauthorized aliens for state income or business tax purposes;
- A United States citizen or any authorized alien may bring a civil action in state court against an employer who fails to hire or who fires the employee while the employer knows or reasonably should know that it employs an unauthorized alien. This could be huge especially if the employee or applicant also brings a claim for discrimination;
- Picking up and hiring workers on the street is prohibited;
- It is unlawful to transport or attempt to transport an unauthorized alien if the person knows or shows reckless disregard for the alien's unlawful status.

Georgia

Last month Governor Nathan Deal signed a law which mandates that all employers use E-Verify by a certain timeframe, depending on the number of employees. Previously, only employers who had contracts or subcontracts with the State were required to use E-Verify.

- Any business in Georgia with 500 or more employees must enroll and use E-Verify by January 1, 2012;
- Businesses with 100 or more employees but fewer than 500 must use the E-verify program beginning July 1, 2012;
- Businesses with more than 10 employees but fewer than 100 must use the E-verify program as of July 1, 2013.

Tennessee

Last week, Governor Bill Haslam signed the Tennessee Lawful Employment Act. The law requires businesses to request and maintain the following documentation from non-employees, **such as independent contractors**, prior to provision of any labor or services:

- Valid Tennessee driver's license or photo identification;
- Official birth certificate issued by a U.S. State or territory;
- A valid, unexpired U.S. passport;
- U.S. certificate or report of U.S. citizen birth abroad;
- Certificate of citizenship;
- Certificate of naturalization;
- U.S. citizen identification card; or
- Valid alien registration document.

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Note that federal law does not require employers to request and maintain this type of documentation from non-employees, so this stricter obligation only applies to businesses in Tennessee.

The law also requires employers to either: (1) request and maintain a copy of any one of the required documents (listed above, which could be problematic as it is more restrictive than the list of I-9 acceptable documents); or (2) enroll in the federal E-Verify program according to the following schedule:

- Governmental entities and private employers with at least 500 employees must comply by January 1, 2012;
- Private employers with between 200 and 499 employees must comply by July 1, 2012;
- Private employers with between 6 and 199 employees must comply by January 1, 2013.

E-Verify Self Check

The above state laws are "front end" solutions for employers to try to avoid hiring unauthorized workers. In other words, they attempt to detect an issue before the illegal immigrant starts working. U.S. Citizenship and Immigration Services ("USCIS") recently announced a new front end solution available to **employees and applicants**. E-Verify Self Check is a voluntary, free, and secure service **workers** can use to check DHS and SSA databases before applying for employment. This gives individuals an opportunity to correct any mistakes or note name changes in their records. It should be noted, however, that these results do not satisfy or replace an employer's obligation to utilize E-Verify should the employer be required to use this service. Initially, E-Verify Self Check is only available to individuals who are located and maintain addresses in Arizona, Colorado, Idaho, Mississippi, Virginia, and the District of Columbia.

The Long Awaited Guidance on Handling SS Mismatches

After a hiatus of several years (due to litigation), the SSA has started issuing no-match letters. Although responding to no-match letters is a "back-end" response and will probably come into play more with employers who do not use E-Verify or who haven't started using it until recently, it is no less important. We finally have guidance on how to handle no-match letters from the Department of Justice ("DOJ"). The DOJ's new guidance reflects some "old" suggestions by DHS in the regulations that it published years ago. (For more information on the DHS regulations, please see our August 2007 E*Zine.)

According to the DOJ, the employer should determine whether the problem is due to a typographical or input error and work with the employee to make sure that the name and Social Security Number ("SSN") have been reported correctly. If there is no error, the employer should then ask the employee to contact the local SSA office in order to resolve the problem. Receipt of a no-match letter, however, cannot be used as the basis for taking adverse action against the employee or to draw conclusions regarding immigration status or work authorization.

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The guidelines also provide in part as follows:

- Employers cannot attempt to re-verify employment eligibility/complete a new I-9 based solely on receipt of a no-match letter;
- Employers must give the employee an opportunity to review and correct mistakes in name and Social Security Number (SSN) in the employer's records;
- Employers cannot require the employee to produce specific documentation for responding to a no-match. In this regard, the employer **cannot** require the employee to produce written evidence from SSA or other government entity that the no-match has been resolved;
- The employee cannot be terminated, suspended, or suffer any adverse action solely based on receipt of a no-match letter;
- The employee must be given a reasonable amount of time to gather documents in order to resolve the mismatch. The guidance does not suggest what constitutes a reasonable period of time but notes that it will depend on the totality of the circumstances. The DOJ also notes that SSA can continue a tentative non-confirmation under E-Verify for up to 120 days, thus recognizing that resolution of discrepancies can take a while;
- Employers must treat all employees similarly (follow the same procedures) regardless of citizenship or national origin;
- Employers may document meetings or communication with employees regarding resolution and the need for additional time to address the no-match;
- Use of the Social Security Number Verification Service ("SSNVS") or Telephone Number Employer Verification ("TNEV"), both free services, may minimize receipt of no-match letters.

Unfortunately, the guidance is not as specific as previous regulations which provided a safe harbor defense against knowingly hiring unauthorized workers. Only time will tell how the requirements and expectations of the different government agencies will play out. One thing is clear: if, in the course of attempting to resolve a no-match, the employee confesses that he/she is not authorized to work, then the employer should immediately terminate the employee. There are, however, some gray areas. The guidance does not address what the employer should do if the no-match is not resolved within a reasonable period of time or if the employee presents other conflicting documentation. Perhaps two things are clear, the second thing being—employers cannot ignore no-match letters.

—*Laurie M. Chess* and *Mary Ellen Jordan*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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